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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 857

UNITED STATES GYPSUM COMPANY, A CORPORATION,
Petitioner,

vs.

NATIONAL WAR LABOR BOARD ET AL.,
Respondents.

BRIEF ON BEHALF OF PETITIONER HEREIN IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the court below (R. 98-99) is reported in U. S. App., D. C. ....., 145 Fed. (2d) 97.

There was no formal opinion by the District Court. The court's decision was announced from the bench upon the conclusion of the oral argument.

JURISDICTION.

The judgment of the court below was entered on October 23, 1944. (R. 100.)

The jurisdiction of this court is invoked under section 240(a) of the Judicial Code as amended (Sec. 347(a), Ch. 9, Title 28, United States Code).

STATEMENT OF THE CASE.

The statement included in the accompanying petition for certiorari states in somewhat condensed form what this case is about. Briefly summarizing what was there said the facts are these:

Petitioner owns a plant at Warren, Ohio, formerly engaged in the manufacture of metal lath and now engaged in the manufacture of expanded metal grating, stair treads, platforms and other expanded metal specialties for use on merchant ships, warships, and tanks. (J. A. 7.) There has been no interruption of work at the plant, nor was any such interruption threatened or imminent among Petitioner's employees. (J. A. 7-8.)

Petitioner and the Union had agreed upon all terms and conditions of employment except for the demand of the Union for a retroactive wage increase to May 20, 1942, and for a provision for maintenance of membership and a provision for check-off. (J. A. 8-10.) May 20, 1942 was the expiration date of the theretofore existing contract. The Board in its order of May 31, 1943, which is the order here involved, allowed the retroactive wage increase to July 20, 1942, directed that the Board's standard clause for maintenance of membership and check-off be included in Petitioner's contract with its employees. The provision for maintenance of membership would require Petitioner to discharge any employee who should withdraw or be expelled from the Union. The provision for check-off would require Petitioner to collect from the Union all union dues and initiation fees due it. (J. A. 14-15.)

Unless these provisions were authorized by the proviso in section 8(3) of the National Labor Relations Act

and could validly be imposed upon Petitioner by the order of the Board it would seem obvious that by including such provisions in its labor contract with its employees Petitioner would be in direct violation of the National Labor Relations Act.[1]

The directive order in question was mandatory in form. By it the Board "directed" (1) that the company "shall make" the wage increase in question, and (2) that the provisions for maintenance of membership and check-off "shall be incorporated" in the contract between the parties. (J. A. 14.)

By formal letter to the Board Petitioner challenged the Board's order. (J. A. 16-18.) By its said letter Petitioner asserted that the order was beyond the powers of the Board; that the Board had not been empowered by Congress to order any employer to adopt the provisions for union maintenance and check-off; that under such provisions Petitioner's employees would not be free to resign from the union, and that Petitioner would be compelled to discharge them if they failed to maintain their union membership in good standing; that the order violated those fundamental principles of liberty which Petitioner and its employees then enjoyed; that the employee had the inherent right to work and was doing so and should be free to join or refuse to join or to resign from a union without losing his job, and that Petitioner had the right to be free to employ the person best suited for the work; that the order would require Petitioner to discriminate against its employees in direct violation of the National Labor Relations Act and would compel Petitioner to give support to the Union by the provision for check-off, and to discriminate against its employees if they should resign from the Union, or if the Union should declare them not

1. Cf. *Wallace* and *Richwood* cases, No. 66-67, ... U. S. ....., decided December 18, 1944.

in good standing; that Petitioner respected the right of its employees to join the Union and had no objection to legitimate Union practices, but that Petitioner strongly objected to the Board's attempt to compel it to enter into a contract which Petitioner believed to be illegal, or to compel it to join in a surrendering of its fundamental freedom; that if administrative commissions were allowed to go unchallenged in cases like the present one our constitutional form of government would be imperiled; and that Petitioner desired to continue to obey the law, preserve constitutional government, to maintain management by undivided responsibility, to remain competitive, and to leave its employees the freedom preserved for them by the Constitution and the Bill of Rights. The letter concluded with a statement that "in keeping with good citizenship the company rejects the Board's order."

This letter was followed by a telegraphic order upon Petitioner to show cause why Petitioner should not comply with the order. (J. A. 18.)

The hearing was had on June 24, 1943, and Petitioner, through its counsel, renewed its objections to the order. (J. A. 18-20.) Apparently the real purpose of the show cause hearing was to enable the Board to make a specific record in the case of the Board's contention that the order against Petitioner was final, binding and compulsory upon Petitioner, and that Petitioner would be required to comply therewith.

The complaint then set forth certain statements made during the course of the hearing by Wayne L. Morse, Compliance Officer of the Board, which were clear and unmistakable threats against Petitioner that it would be forced to comply with the Board's order. (J. A. 20-23.)

Mr. Morse specifically referred to the Board's decision in the so-called Little Steel case, and included the opinion

therein in the record in the instant case. The Board made it clear at the hearing that the Board's power and authority under delegation from the President (Executive Order 9017) was that of "compulsory arbitration," that the order was binding upon Petitioner and would have to be obeyed by it. Mr. Morse, in substance, said that it made no difference whether or not Petitioner remained in business if by so doing it endangered the so-called no-strike, no-lockout policy of the Government, and that there was no basis whatsoever for challenging the war powers of the President in providing for such a system of compulsory arbitration.

It appears from the opinion in the Little Steel case that the Board there had said that as Commander-in-Chief in time of war the President's authority extended not only to matters of strictly military nature or to problems directly related to military activity, but also to whatever phases of civilian life must be controlled in order to prosecute the war successfully. (1 W. L. R. at p. 353.)

In substance and effect the contention is that in time of war the President, as such or as Commander-in-Chief, has full and absolute control over not only all military affairs, but also over all civilian economy, and solely through and by himself may exercise all of the war powers of the national government with or without action by the legislative branch of the government. We can imagine no more pernicious, dangerous and subversive theory than that thus announced when we consider that we are living, or are supposed to be living, under a constitutional system of government.

The complaint then set forth the enactment of the War Labor Disputes Act on June 25, 1943 over the President's veto (J. A. 24), and the issuance of Executive Order 9370 by the President on August 16, 1943. (J. A. 28.) By

this last named order, which was entitled as "authorizing the Economic Stabilization Director to take certain action in connection with the enforcement of the orders of the National War Labor Board," the Director of Economic Stabilization was "authorized and directed" to issue such directives as he may deem necessary, among other things, to other departments or agencies of the Government to the end of withholding or withdrawing from a noncomplying employer any priorities, benefits, or privileges extended or contracts entered into by executive action of the Government until the Board had reported that compliance had been effectuated. (J. A. 29.)

It further appears from the complaint that in conjunction with the release of said Executive Order the President addressed a letter to the Chairman of the National War Labor Board to the effect that he was writing regarding the question of compliance with Board orders under the War Labor Disputes Act which, it was said, he and Mr. Davis had been considering. (J. A. 30.) It was said that the War Labor Disputes Act empowered the Board to prescribe the terms and conditions governing the relations between the parties which should be in effect until further order of the Board. (J. A. 30.) Also that "Congress intentionally left the enforcement of these orders to executive action." The President then said that it would be helpful, in the light of their combined experience in dealing with disputes under Executive Order 9017, and more recently under the Act, to define a program for bringing about compliance in the relative few cases in which executive action might become necessary. (J. A. 30.) The President then outlined certain proposed actions. (J. A. 30-31.) The letter also stated that the President was "requesting the Director of Economic Stabilization to direct the application of any or all of such

sanctions in necessary cases upon report by the Board of noncompliance." (J. A. 31.)

The President then stated that he had been informed that during the past eighteen months there had been only seven cases which had had to be referred to him because of "persistent noncompliance." (J. A. 32.) Neither Executive Order 9370 nor the President's letter to Mr. Davis made any specific distinction between the imposing of sanctions to enforce compliance with the orders of the Board entered prior to the enactment of the War Labor Disputes Act or to imposing sanctions with respect to an order of the Board entered subsequent to the enactment of such Act. And at no time since the issuance of Executive Order 9370, and notwithstanding the litgation in the Motor Carriers case, the Montgomery Ward case and the instant case, has the President by any subsequent order limited No. 9370 to orders issued subsequent to the enactment of the War Labor Disputes Act.

The complaint then alleged that the direction to the Economic Stabilization Director embodied in Executive Order 9370 "was intended" by the President as a specific direction to the Director to issue some one or more of the directives specified in the order against employers, including Petitioner, who had not complied with the Board's orders entered against such employers. (J. A. 32.) It was then alleged that pursuant to such Executive Order the Economic Stabilization Director, either as such Director or through the Economic Stabilization Board, "is required to, will, and is about to, issue some one or more of the directives specified in said paragraphs (a), (b), and (c) of said Executive Order directed against Petitioner." (J. A. 32-33.) It was then alleged that Petitioner, at its said Warren plant, enjoyed and had certain priorities, benefits, and privileges of the nature referred to in Executive Order 9370

which were necessary for the manufacture of the products at said plant, and which, if withheld or withdrawn from Petitioner, would prevent its continued successful operation of said plant (J. A. 33.); that the National War Labor Board "has reported to the said Director of Economic Stabilization " that Petitioner had not complied with the order of May 31, 1943, and "said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff but acting under the direction of said Director are about to or have taken action to withhold or withdraw from" Petitioner some or all of said priorities, benefits, or privileges "for the sole purpose of compelling" Petitioner to accept the order of May 31, 1943, "and will continue to do so unless restrained by order" of the court. (J. A. 33.)

The complaint then alleged that neither of said Executive Orders of the President nor the War Labor Disputes Act, nor any other order or Act of Congress, made provision for any procedure in any court of law or equity "in which the propriety of the assumption of authority by the Board to enter said Directive Order of May 31, 1943, or to compel compliance therewith by plaintiff, or of the assumption of authority by the President of the United States to issue said Executive Order of August 16, 1943, or to impose sanctions upon plaintiff for failure to comply with said Directive Order of May 31, 1943, as in said last mentioned Executive Order provided, or of the assumption of authority by the Board or Director of Economic Stabilization or other department or agency of the government to issue any order or take any action as in said Executive Order of August 16, 1943, provided, may be challenged or determined by any court." And that unless the District Court should take jurisdiction of the case Petitioner was without adequate remedy to challenge or attack in any court the right or jurisdiction of Respondents to enforce the provisions of

said order of May 31, 1943, or to compel, by sanctions or otherwise, compliance therewith by Petitioner. (J. A. 33-34.) It was asserted in the complaint that the imposition of sanctions under Executive Order 9370, and the assumption of authority by Respondents to impose the same upon Petitioner as therein provided, constituted an unlawful attempt to collect a penalty from Petitioner for its failure to comply with the terms of said Directive Order of May 31, 1943, and was an attempt to legislate and to usurp the authority of the legislative branch of the Government. (J. S. 34.) The complaint requested certain adjudications by the court as to the validity or authority of the National War Labor Board as claimed and asserted by it, and the constitutional validity of the executive orders in question and of the actions of Respondents thereunder (J. A. 34-38), and for injunctive relief.

Thereupon, without the filing of an answer, Respondents moved to dismiss the complaint, and in the alternative for summary judgment. The motion to dismiss asserted (1) that the court lacked jurisdiction over the subject matter, first, because there was no "controversy" sufficient to give the District Court jurisdiction, and, second, that the suit was against the United States, and (2) that the complaint failed to state a claim against any of the defendants upon which relief could be granted. (J. A. 46.) As to the point that the complaint failed to state a claim upon which relief could be granted it was urged on brief, first, that Petitioner was not entitled to injunctive relief because it had not shown that it had been or would be irreparably damaged by any action or threat of action by any of Respondents, that the Board's order was "not self-enforcing" and that the members of the War Labor Board were not charged with the enforcement of the order by employment of legal sanctions for failure to comply therewith. It was further urged that inasmuch as the complaint had charged

that the War Labor Board had reported Petitioner's noncompliance with the President's order there was nothing further for it to do.

As to the Director of Economic Stabilization and the Economic Stabilization Board and its members, it was said that none of them had threatened to enforce the Board's order or to take any action against Petitioner for its noncompliance with such order, that the Economic Stabilization Director had disclaimed any power to enforce the sanctions specified in Executive Order 9370 in a case like the instant one, and that the functions of the Economic Stabilization Board were unrelated to Executive Order 9370, and in any event were purely advisory.

It was further said that Petitioner was not entitled to any declaratory relief because there again there was no "case of actual controversy" between Petitioner and any of Respondents since, as it was said, the Board's order was not self-enforcing and "did not fix or alter the legal rights of the parties." It was further said that Executive Order 9370, for the reasons stated, did not apply to the Board's order, and that there had been no threats to apply against Petitioner any sanctions pursuant to Executive Order 9370.

It was further said that inasmuch as the complaint challenged the validity of "compulsory arbitration" attempted to be put into effect by the executive branch of the Government, the validity thereof was not open to question inasmuch as the President himself was not a party to the suit. It was urged that the constitutional validity of Executive Order 9017, which created the National War Labor Board, and the orders of the Board pursuant thereto, did not, therefore, present a "case of actual controversy."

In support of the motion for summary judgment Respondents filed the affidavit of Lloyd K. Garrison (J. A. 46-47) which incorporated in it a letter from the Director

of Economic Stabilization to the Chairman of the National War Labor Board. (J. A. 48.) Petitioner filed opposing affidavits. (J. A. 50-93.) These affidavits are discussed in the statement in the accompanying petition for certiorari, to which reference is had.

Respondents' motions were overruled by the District Court (J. A. 95) and the court below allowed a special appeal from such order. (J. A. 95.) Thereafter, on October 23, 1944, the order of the District Court was reversed and the cause was remanded for further proceedings not inconsistent with the opinion of the court. (R. 100.)

In *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board*, 79 U. S. App. D. C. ——, 143 Fed. (2d) 145, which the court below in its opinion herein said was controlling (R. 98), the order of the District Court granting motions there made to dismiss the complaint and for summary judgment was affirmed. It is therefore to be assumed that the court below in its decision in the instant case intends that upon remand to the District Court Respondents' motions are to be allowed and Petitioner's complaint is to be dismissed.

In addition to the foregoing, the court may take judicial notice of the proceedings before, and the testimony given by the Chairman of the National War Labor Board, by Mr. Morse, and by the Attorney General of the United States, before the Select Committee of the House which was appointed to inquire specifically into the seizure of the Chicago plant of Montgomery Ward & Company in the spring of 1944. The Committee's report and the testimony before it are now comprised in a printed report which we understand constitutes a public document.

The court should take cognizance of the views expressed before the Committee by the persons above referred to not merely to show the making of threats, but to show

what is meant by Respondents' contention that the orders of the National War Labor Board are merely "advisory." We are constrained to believe that when the court below used that term in the *Motor Carriers* case, in the *Montgomery Ward* case, and in the instant case, as characterizing the orders of the Board, it meant what this court said in the old Railroad Labor Board cases to the effect that the orders were unenforcible "in any way" and rested solely and entirely for any compulsory effect upon mere public opinion. That is not, however, what Respondents mean by the word "advisory," nor is that their real contention on the question of the binding effect of the Board's orders and their enforcement. Respondents' contention, as is that of the chief law officer of the Federal Government, is that the Board orders, whether entered before or subsequent to the enactment of the War Labor Disputes Act, do in fact and law constitute "compulsory arbitration," that therefore such orders are binding legally upon the employer and must be complied with by him, and that such orders are enforcible by executive action. The Attorney General was very explicit in that regard. He left nothing to the imagination. In the first place he seemed to regard the decisions in the old Railroad Labor Board cases as meaning merely that the orders of the Board there were not enforcible "in the courts." (Committee Report, p. 141.) There was, however, no such limitation in the decision of this court in those cases. The statement was that the orders were not enforcible "in any way"; that they rested for their effect entirely upon public opinion. The Attorney General then said that if the War Labor Board is not obeyed then the Executive has the right to take over the plant specifically. (Committee Report, p. 142.) And that when the Board decided "then to enforce them the President has the power to seize.' (Committee Report, p. 143.)

In the accompanying petition for certiorari we have posed to the court as one of the questions presented as to whether the Board's orders can be both merely "advisory" and at the same time enforcible by executive action. And that is one of the matters which should be dealt with by a declaratory judgment. How the question is to be decided is separate and distinct from the question as to whether or not the decision, whatever it may be, should be made a matter of judgment.

ERRORS TO BE ASSIGNED AND QUESTIONS PRESENTED.

1. The court below erred in reversing the order of the District Court and requiring a dismissal of the suit where it appeared that the National War Labor Board had entered its order against Petitioner, mandatory in form, and, as a part of the record in the case, specifically asserted that the order was binding and compulsory upon Petitioner, and threatened its enforcement against Petitioner.

   (a) The court below erred in not affirming the order of the District Court and in not permitting the District Court to determine the substantive questions presented by the complaint.

2. The court below erred in not holding that the mere fact that after the commencement of suit Respondents claimed that the Board's order was advisory only and did not fix the legal rights of the parties did not prevent Petitioner from securing the relief sought.

3. The court below erred in holding that the mere fact that it considered the Board's orders to be "advisory" justified or required the dismissal of Petitioner's complaint, by which dismissal Petitioner will be denied any relief sought by its complaint, and will be left wholly without protection against the threatened enforcement of the order.

4. The court below erred in holding that notwithstanding that the Board's order might by only "advisory," Petitioner's complaint should be dismissed in the face of the Board's specific threats of enforcement, and that Petitioner should be denied at least a judgment declaring its rights and legal relations with respect to the order.

5. The court below erred in holding that the Board's order was merely "advisory" and at the same time enforcible by executive action.

(a) The court below erred in not holding that if the Board's order was enforcible, or was threatened to be enforced, by administrative action, as was the case presented here, the Board's order was reviewable.

(b) The holding of the court below in the instant case is inconsistent with its holding in the *Motor Carriers* case where it was said as a ground for decision there that "no one threatens administrative proceedings" against the employer "based upon the Board's order." Such administrative proceedings are in fact threatened against Petitioner here, and Respondents and the executive officials of the Government assert that the Board's orders may be made, or are, the subject matter of administrative proceedings.

6. The court below erred in not holding that the District Court should be permitted to pass upon the question as to whether the National War Labor Board could impose a contract of any kind upon Petitioner, and whether the imposition of such contract would violate Petitioner's constitutional rights, and as to whether, by being required to accept the provisions for maintenance of membership and check-off, Petitioner would be required to act in violation of the National Labor Relations Act.

7. The court below erred in not specifically holding that the complaint herein stated a claim or cause of action, and that the complaint showed the existence of a controversy sufficient to give the District Court jurisdiction.

8. The court below erred in not holding that the complaint stated a claim or cause of action when the complaint asserted the entry of the Board's order of May 31, 1943, and specifically charged that the Director of

Economic Stabilization had, or was about to, impose some or all of the sanctions designated in Executive Order 9370 in order to enforce compliance by Petitioner with the Board's said order.

9. The court below erred in not holding that the Garrison affidavit, either with or without the Vinson letter, presented no evidentiary matter for the consideration of the court, and furnished no ground for granting Respondents' motion for summary judgment.

10. The court below erred in holding that the allegations of the complaint that the Director of Economic Stabilization—

> "has or is about to issue some one or more of the directives specified in paragraphs (a), (b), and (c) of Executive Order 9370.
>
> "The said Director of Economic Stabilization and other departments or agencies of the Government unknown to plaintiff (Petitioner), but acting under the direction of said Director, are about to or have taken action to withhold or withdraw from plaintiff (Petitioner) some or all of said priorities, benefits, or privileges for the sole purpose of compelling plaintiff (Petitioner) to accept said Directive Order of May 31, 1943, and will continue to do so unless restrained by order of this court,"

constitute a mere prediction without legal effect and do not constitute statements of fact.

11. The court below erred in reversing the order of the trial court in denying Respondents' motions to dismiss the complaint and for summary judgment, thereby in effect directing the granting of such motions without at least a direction that there be a determination by at least a declaratory judgment of the nonbinding effect of the Board's order and of what the rights and relations of Petitioner were with respect to such order.

SUMMARY OF ARGUMENT.

The District Court Had Jurisdiction Over the Subject Matter of the Complaint.

A. The Complaint Presents a Case or Controversy With Respondents.

1. The court below in its decision in *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board, et al.*, 79 U. S. App. D. C. ....., 143 Fed. (2d) 145, 147, held that the order of the Board entered prior to the enactment of the War Labor Disputes Act was merely "advisory"; that "no one threatened and no one could maintain * * * administrative proceedings against the appellants upon the authority of the Board's order," and that under such circumstances "there is no occasion for review of the Board's order." In the instant case the court holds that the *Motor Carriers* case was controlling. (R. 98.)

In the *Montgomery Ward case*, 79 U. S. App. D. C., ..., 144 Fed. (2d) 531, it was said that the complaint "does not state the form, substance, time, place or circumstances of any threat."

In the instant case the record shows that before the complaint was filed the Board not only had entered its order against Petitioner, but had taken the position that the order was binding upon and enforcible against Petitioner as constituting "compulsory arbitration." And the Board threatens to compel compliance by force. The threats went to the point of threatening Petitioner with the extinction of its business if it did not comply with the order. The specific threats made against Petitioner were made a part of the record in the case upon the occasion of and

through the guise of the show cause hearing. These allegations are all admitted by the motion to dismiss. To make such threats a part of the record in the case was apparently the real purpose of the hearing.

The position of the Board as to the compulsory effect of its orders was in conformity with the views repeatedly expressed by the Board in numerous cases which had come before it both before and after the decision here. The *"Little Steel"* cases, 1 W. L. R. 325; *Toledo, Peoria & Western Railroad Company*, 3 W. L. R. 518; *S. A. Woods Machine Company*, 2 W. L. R. 159; *J. Greenebaum Tanning Company*, 10 W. L. R. 527; *U. S. Vanadium Company*, 13 W. L. R. 527. In addition it appeared from affidavits filed that Mr. Davis, the Chairman of the Board, and Mr. Morse, who was Compliance Officer of the Board, had testified before one of the committees of the House of Representatives that the Board's orders entered under Executive Order 9017 constituted "compulsory arbitration"; that the terms and conditions of employment decided upon by the Board, which included the provisions for maintenance of membership and check-off, were imposed upon the employer against his volition, and that since said orders were binding and compulsory upon such employer, he would be compelled to comply therewith. Furthermore, in addition to certain seizures of plants for the enforcement of the Board's orders, to which Mr. Morse referred, he said that in the *Windsor* case the Board sought to induce other governmental agencies to impose sanctions upon that company for its failure to comply with the Board order. In the *Greenebaum* and *Vanadium* cases the Board held that its orders were compulsory, superseded state law, and that the Board's powers were the same under Executive Order 9017 as they were after the enactment of the War Labor Disputes Act so far as concerned the binding effect of such

orders. An employer must comply even though in so doing he violates the law of the state.

An order of the Board cannot be merely "advisory" and at the same time enforcible by executive or administrative action. In the old Railroad Labor Board cases this court said that the orders of that Board were not enforcible "in any way," and rested for their effect upon mere public opinion. *Pennsylvania Railroad System* v. *Pennsylvania Rd. Co.*, 267 U. S. 203, 216; Id 261 U. S. 72. There was nothing "advisory" about the order in the instant case." The threats as set forth in the complaint were specific, and Petitioner insists that unless it is given relief by at least a declaratory judgment as to the nonbinding character of the order upon it the threats in question will be successful.

Even if the orders are now said by Respondents to be "advisory," and even if the court so holds, such is no reason for denying Petitioner any relief, and in dismissing the complaint, when Respondents have specifically threatened to enforce the order against it.

Prior to the commencement of the suit the order was asserted to be binding and compulsory upon Petitioner, and the Board threatened to enforce the order against it. The concession by Respondents after commencement of suit that the order is merely advisory admits plaintiff's claim and requires without more a judgment awarding Petitioner all appropriate relief.

2. The complaint specifically alleged that the National War Labor Board had reported to the Director of Economic Stabilization Petitioner's noncompliance with the Board's order, and that the Director of Economic Stabilization was about to or had taken action to withhold or withdraw from Petitioner some or all of the priorities, benefits, and privileges referred to in Executive Order 9370

for the sole purpose of compelling Petitioner to comply with the order of May 31, 1943. Nothing in the order itself, or in the President's letter to Mr. Davis, clearly makes any distinction between orders of the Board issued before, and those issued after, the enactment of the War Labor Disputes Act. Executive Order 9370 did not refer to plant seizures under the War Labor Disputes Act, but had to do with administrative enforcement of the Board orders. In his letter to the Chairman of the War Labor Board the President stated that Congress had left the enforcement of Board orders to executive action. The executive branch of the Government may not provide for "compulsory arbitration"—certainly without legislative sanction. "Compulsory arbitration," with executive enforcement thereof, can only mean martial rule. "Compulsory arbitration" of itself is violative of the rights guaranteed by the Federal Constitution.

3. Under the circumstances presented in the instant case Petitioner is entitled to its action against the administrative body involved, and, by injunctive relief or relief under the Declaratory Judgments Act, Petitioner may have its rights determined. See *Stark* v. *Wickard*, 321 U. S. 288. Under the circumstances presented by the instant case a declaratory judgment is proper. *Coffman* v. *Breeze Corporation, Inc. and the United States*, No. 71, this term, decided January 2, 1945, ... U. S. .....; *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227.

A suit may be maintained for declaratory judgment under proper circumstances even in the absence of specific threats. See *Currin* v. *Wallace*, 306 U. S. 1. And a suit may be maintained against the administrative officials having to do with the administration of the challenged act even if they have no enforcement powers of their own. *Currin* v. *Wallace, supra.*

The *Motor Carriers* case was essentially an effort by the employer to have the merits of the Board's order reviewed by the court. In the instant case the character of the order as claimed by Respondents, and its threatened enforcement against Petitioner, created constitutional questions which were proper for submission to the court. In addition Petitioner had the right to have the question determined as to whether it could be required to accept the provisions for maintenance of membership and check-off as against the specific provisions of the National Labor Relations Act.

The contention that both parties here agree that the Board's order was without binding effect is specious. Petitioner contends that the Board's order, claimed to be compulsory and binding as amounting to compulsory arbitration, is violative of its constitutional rights, is therefore void, and in that sense is without binding effect. Respondents contend that the Board's order was advisory, meaning only that it is not enforcible by judicial process but is enforcible by executive action. The court below holds that the order is "advisory," probably meaning "advisory" in its fullest literal sense. But whatever may be the reasons for holding the order to be unenforcible against Petitioner, Petitioner is entitled to its judgment.

B. The Suit Here Is Not in Effect One Against the United States.

A suit against administrative officials is not, under the circumstances presented here, a suit against the United States. *Stark* v. *Wickard*, 321 U. S. 288.

II.

Petitioner Established a Claim Against Respondent Upon Which Relief May Be Granted.

A. Petitioner Stated a Claim Upon Which Injunctive Relief May Be Granted.

Petitioner is entitled to relief in equity. The complaint shows that the threatened enforcement of the order will destroy its property and business. Petitioner need not await the consummation of the threatened injury before it brings suit. Petitioner is entitled to the injunctive process of the court to prevent such injury. Furthermore Petitioner is not to be required to speculate as to what action the Board will take, or to assume the hazard thereof.

While the court may have the right to determine judicially the meaning and effect of Executive Order 9370 as to orders entered prior to the enactment of the War Labor Disputes Act, its determination in that regard should be made the subject matter of a judgment. Petitioner should not be in the position of having its complaint dismissed with the result that there would be no judgment on the record which would have any binding effect upon Respondents. Whatever the views of the court might be as expressed in his opinion, they are not formally a part of judgment itself, and if the judgment is one of dismissal of the complaint Petitioner is denied all remedy.

B. Petitioner Has a Claim Upon Which Declaratory Relief May Be Granted.

Declaratory relief may be granted wholly irrespective of whether any other or further relief may or may not be had. The circumstances presented in the instant case require declaratory relief for Petitioner. *Currin* v. *Wal-*

lace, 306 U. S. 1; *Aetna Life Insurance Company* v. *Haworth,* 300 U. S. 227. Even though the court below were right in holding that the Board's order was merely "advisory," such holding should be incorporated into a judgment so that Petitioner's rights and legal relations with respect to the order will be the subject matter of a judicial and binding determination. Under such circumstances a declaratory judgment might, and probably would, have all of the salutary effect of an injunction. *Great Lakes Co.* v. *Huffman,* 319 U. S. 293. Upon an issue as to the binding character of the Board's order the court may inquire into the constitutional validity of Executive Order 9017. The fact that the President himself is not a party to the proceeding is immaterial. *United States* v. *Lee,* 106 U. S. 196; *Ex parte Quirin,* 317 U. S. 1; *Hirabayashi* v. *United States,* 320 U. S. 81.

III.

Respondents Were Not Entitled to a Summary Judgment.

A party moving for summary judgment must show that there is no genuine issue of fact and that he is entitled to a judgment as a matter of law. (Rule 56.) Nothing in the Garrison affidavit presented any evidentiary fact. Affidavits in support of a motion for summary judgment must be evidentiary in character and not conclusory. *Walling* v. *Fairmount Creamery Co.,* C. C. A. 8, 139 Fed. (2d) 318. All of the allegations of the complaint well pleaded are admitted by the motion to dismiss. It therefore stands admitted for present purpose that the Director of Economic Stabilization is about to take action pursuant to 9370 against Petitioner.

The substantive questions presented by Petitioner, and which have not as yet been passed upon by the District

Court because of the special appeal to the court below and its present decision reversing the District Court, are simple and clearcut. That their answer may be difficult is another question. Grave constitutional questions are presented here, inasmuch as the executive branch of the Government, without legislative sanction, is attempting to declare a national policy with respect to employer-employee relationships, is attempting to provide for a system of compulsory arbitration with "compulsory arbitration awards" enforcible by executive or administrative action—and all of this accompanied by a denial of the right of the citizen to resort to the judicial branch of the Government for a determination of the question as to whether his constitutional rights have been invaded, and whether he is otherwise being required to proceed in direct violation of specific laws passed by the Congress.

While technically this case would ordinarily be sent back to the District Court for determination of such questions, nevertheless this court, in the exercise of its broad supervisory powers over the proceedings of the lower courts, would have the right to take this case and decide all of the questions thus presented. And Petitioner suggests that if certiorari be granted in this case that the parties be directed to file briefs on the constitutional and other questions presented.

ARGUMENT.

I.

The District Court Had Jurisdiction Over the Subject Matter of the Complaint.

A. The Complaint Presents a Case or Controversy With Respondents.

1. The court below, upon the purported authority of its decision in *Employers Group of Motor Freight Carriers, Inc.* v. *National War Labor Board, et al.*, 79 U. S. App. D. C. , 143 Fed. (2d) 145, holds that the Board's order of May 31, 1943 is not reviewable because it is merely "advisory." From its reference in the *Motor Carriers* case to the decisions involving the old Railroad Labor Board cases[2] we assume that the court below used the term "advisory" in the sense that the Board's order was wholly unenforcible in any way, at any time, at any place, or by any person. As said in the *Motor Carriers* case "no one threatened, and no one could maintain • • • administrative proceedings against the appellants upon the authority of the Board's order. In these circumstances there is no occasion for review of the Board's order." (143 Fed. (2d), p. 147.) Also it was said by the court below in the *Montgomery Ward* case:

> "There are 22 defendants. The complaint does not state the form, substance, time, place or circumstances of any threat. We must not ignore the probability that if the complaint meant to allege threats it would say what form they took and when and to whom they were made. We understand the complaint to mean not

2. *Pennsylvania Railroad Company* v. *United States Railroad Labor Board*, 261 U. S. 72; *Pennsylvania Railroad System, etc.* v. *Pennsylvania Railroad Company*, 267 U. S. 203.

> that all 22 of the defendants, or any of them, have made threats, but that the plaintiff considers the situation threatening." (144 Fed. (2d), p. 531.)

Apparently the things thus mentioned by the court below in the other two cases were regarded as of considerable, if not controlling, importance in the disposition of such cases. But in the instant case all of such matters which are present in the instant case have seemingly lost all importance.

The fact remains that before the complaint was filed herein the Board took the position that its order of May 31, 1943 was binding upon, and enforcible against, Petitioner. And the Board threatened to compel compliance by force. Members of the Board authorized to speak for the Board (and no other member of the Board dissented from the views expressed at the time) not only said, at the time of the show cause hearing, that the Board's order was binding and enforcible, but that it was entered pursuant to the power to provide for "compulsory arbitration," which power had been conferred upon the Board by the President. They went further. They said that the order would be enforced against Petitioner; that they would turn to the President for final enforcement, and would urge upon him the exercise of all the war powers as were necessary to secure compliance; that Petitioner's defiance of the Board would not be allowed, and that its challenge to the Board must be met with all the forces of the Government necessary to meet it. They further threatened Petitioner with the extinction of its business if it did not comply with the order.

These specific threats which were set forth in the complaint were a part of the record of the case and apparently the real purpose of the show cause hearing was to make a record in the case of such threats.

The position taken by the Board at the time was in precise conformity with the views repeatedly expressed by the Board in numerous cases which have come before it.[3] The opinion in the *Little Steel* case was quoted at length by Mr. Morse, Compliance Officer of the Board, at the time of the show cause hearing, and was made a part of the record in the instant case in its entirety.

In addition the affidavits filed by Petitioner showed the sworn testimony of Mr. Davis, the Chairman of the War Labor Board, and Mr. Morse before a special committee of the House to the effect that the Board's power under Executive Order 9017 and its orders pursuant thereto were "compulsory arbitration," and that the terms and conditions decided upon by the Board, which included the provisions for maintenance of membership and check-off, were imposed upon the employer against his volition, and that inasmuch as such orders were binding and compulsory upon the employer, the employer would be compelled to comply therewith. In their said testimony reference was made to seizures of plants for the purpose of enforcing compliance with the Board's orders, and in one instance, the *Windsor* case, the Board sought to induce other governmntal agencies to impose sanctions upon that company for its failure to comply with the Board's order.

In the *Greenebaum* case the Board held that its order in requiring maintenance of membership and check-off was compulsory to the extent that it superseded all contrary state legislation, and that notwithstanding the acceptance of such provisions by the employer would subject him to penalties under the state law, nevertheless he must comply with the Board's order.

3. The *"Little Steel" cases*, 1 W. L. R. 325; *Toledo Peoria & Western Railroad Company*, 3 W. L. R. 518; *S. A. Woods Machine Company*, 2 W. L. R. 159; *Greenebaum Tanning Company*, 10 W. L. R. 527; *U. S. Vanadium Company*, 13 W. L. R. 527.

In the *Vanadium* case the Board said that the powers of the Board under the War Labor Disputes Act were no different from what they were under Executive Order 9017 before the War Labor Disputes Act was enacted; that in either event the orders were compulsory and employers must comply therewith.

We have also called the court's attention to the explicit statements of Mr. Davis and Mr. Morse before the Select Committee of the House to investigate the Montgomery Ward seizure in 1944, and to the testimony of the Attorney General before the same Committee, where the Board's position was reaffirmed, and in addition the Attorney General explicitly stated that the Board's orders would be enforced by plant seizure or by other executive action.

The above matters are referred to show the concept of Respondents and of the Attorney General of an "advisory" order.

Under such circumstances, and in view of the existence of specific threats, which the court below thought necessary when it decided the *Motor Carriers* case and the *Montgomery Ward* case, how can it be said that the Board's order was merely advisory in the sense in which that word was used by the court? Can the order be both "advisory" and at the same time enforcible by executive or administrative action? If the Board's order was "advisory" in the sense of the old Railroad Labor Board cases, and enforcible if at all only by force of public opinion, how could the Board or the President or any other administrative official compel compliance with the Board through plant seizure—which would be nothing but the exercise of martial law under such circumstances—or by the imposition of sanctions as under Executive Order 9370, or by other administrative or executive action? And if the order

was enforcible by administrative action, then how could the court below say that the order was not reviewable, when it said in the *Motor Carriers* case that because no one was there threatening administrative proceedings, nor could anyone maintain such proceedings against the employer, based on the Board's order, the order was therefore not reviewable?

According to the Board's threats at the time of the show cause hearing there was nothing "advisory" about the order. The threats, set forth in the complaint, were explicit and were intended to compel Petitioner to comply with the order. And such threats will be successful unless Respondents are either enjoined or the rights of the Petitioner with respect to the order are declared by judgment under the Declaratory Judgments Act.[4] The legal injury here lies in the assertion of the Board that its order is compulsory and in the threats to compel compliance by force.

But even if the order were "advisory" in the fullest sense, as apparently intended by the court below, does the threat and purpose to enforce such an order operate to deny the employer judicial relief against such enforcement? If an administrative official threatens to enforce an unconstitutional statute does the fact that the statute is unconstitutional or is conceded to be unconstitutional by such official, preclude the party against whom such enforcement is threatened from securing relief from the courts? Where a statute is claimed to be constitutional and its enforcement is threatened, does the court then, upon a finding that the statute is unconstitutional, dismiss the plaintiff's bill or does it award injunctive relief or relief by declaratory judgment, as of course? In the old Railroad Labor Board cases there was no situation presented of an assertion by

4. The admonitory character of a declaratory judgment is something like that of an injunction. *Great Lakes Co. v. Huffman*, 319 U. S. 293.

the Board, there, that its orders were compulsory and enforcible, nor had the Board there entered orders, which it was threatening to enforce against the railroads. Is it conceivable that had such been the case this court would have dismissed the complaint and denied the railroads all relief? Or, had the Declaratory Judgments Act been in effect at that time, is it conceivable that this court would have declined by its judgment to declare the rights and relations of the railroads with respect to the Board's orders?

Petitioner insists that a "controversy" arose at the point when the Board entered its order, asserted its compulsory effect, and threatened its enforcement by all means available and Petitioner denied the Board's claim as in violation of Petitioner's constitutional rights of contract and asserted that it could not legally be compelled to comply with the order.

To say, as Respondents say here, or as the court holds, that the order is only advisory, in its literal sense, and is not enforcible at any time or place, or by anybody, and that therefore there is no "controversy" or no "claim" stated against Respondents is an over-simplification of the question and may be said in every case where a public official purports to act beyond the scope of his authority. Everywhere except in the District Court and in the court below the Board's order was "compulsory arbitration" and to be complied with as such under duress of any and all administrative means available. In the District Court and in the court below, however, the Board's order was advisory and did not fix or determine legal rights.

2. Under date of August 16, 1943, the President issued Executive Order No. 9370. (J. A. 28-29.) The complaint charged that the Board had reported to the Director of Economic Stabilization that Petitioner had not complied

with the Board's order and that the Director of Economic Stabilization "is about to or has taken action" to withhold or withdraw from Petitioner some or all of the priorities, benefits, and privileges referred to in the order for the sole purpose of compelling Petitioner to comply with the order of May 31, 1943. (J. A. 33.)

At this point, therefore, we have the added factor that so far as appears from Executive Order 9370 further administrative action or executive action was to be had against all so-called recalcitrant employers, meaning employers, including Petitioner, who refused to accept the orders of the Board. Obviously such action being administrative or executive in nature there could be no action in court instituted by any Government official to impose such sanctions and thereby to compel obedience to the Board's order. Therefore, unless the employer who was the target of such administrative or executive action could institute action himself in an appropriate court for protection against the exercise of such executive or administrative action, such party would find himself subjected to an unconstitutional process of having his property taken away from him and his constitutional rights invaded wholly without remedy. Is he required to wait until the damage has been done?

Whatever may be said of the right of seizure as provided for in the War Labor Disputes Act, there is nothing in that Act or in any Act which authorized Executive Order 9370. Its purported justification was, as stated in the President's letter to the Chairman of the National War Labor Board, that "Congress intentionally left enforcement of the Act" to him. (J. A. 30.) Nothing in Executive Order 9370 had to do with the existence of strikes or interruptions of work, nor with whatever power the President has to seize a plant in the event of a strike or interruption of work. The sanc-

tions in terms were to be imposed for the sole purpose of compelling compliance with the orders of the Board.[5]

(3) It has been held that under such circumstances there is a controversy and that Petitioner's only remedy is in equity or under the Declaratory Judgments Act for a declaration of rights and the legal relations of the parties. The courts have consistently held that relief may be granted against a public officer where he acts without authority to the injury of another and that no one may be left to his uncontrolled and arbitrary action which is unauthorized by law and in violation of private rights. *Utah Fuel Coal Co.* v. *Bituminous Coal Commission* (1939), 306 U. S. 56; *Goltra* v. *Weeks* (1926), 271 U. S. 536; *American School of Magnetic Healing* v. *McAnnulty* (1902), 187 U. S. 94; *Ickes* v. *Fox* (1937), 300 U. S. 82; *Santa Fe P. R. Co.* v. *Lane* (1917), 244 U. S. 492. In *Ex Parte Young* (1908), 209 U. S. 123; *Philadelphia Co.* v. *Stimson* (1912), 223 U. S. 605; *Truax and the Attorney General of the State of Arizona* v. *Raich* (1915), 239 U. S. 33, 37; and *Terrace* v. *Thompson* (1923), 263 U. S. 197, 214, it was held that equity jurisdiction will be exercised to enjoin the threatened enforcement of an unconstitutional statute.

It is not entirely clear as to the views of the court below as to the presence of a "case" or "controversy." Apparently it thought that there was a sufficient case or controversy so as to enable it to pass upon the effect and nature of an order of the Board. However, in the *Motor*

5. Neither the President nor the Board has any power to compel compliance in such a case. This could mean martial rule only as there is no statute providing for enforcement, or specifically for the imposition of such sanctions or penalties. "Compulsory arbitration" infringes liberty of contract and rights of property guaranteed by the Federal Constitution. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522; Id. 267 U. S. 552; *Wilson* v. *New*, 243 U. S. 332. The power asserted on behalf of the executive branch of the Government is directly opposed to the doctrine laid down in *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U. S. 1; *Hirabayashi* v. *United States*, 320 U. S. 81; *Ex parte Mitsuye Endo*, No. 70 this term. ..... U. S. .....; and *Korematsu* v. *United States*, No. 22 this term. ..... U. S. ....., both decided December 18, 1944.

Carriers case it was said that administrative action could be controlled where either (1) the administrative action was directly injurious to legally protected interests of plaintiff, or (2) it furnished a basis for proper judicial proceedings against the plaintiff. (143 Fed. (2d), p. 143.) Under its first classification the court recognized the decision of this court in *Stark* v. *Wickard*, 321 U. S. 288. The instant case comes fairly and squarely in such class. The Stark case involved a statute. There is even greater need for judicial review, when the executive branch is acting wholly without legislative support. See Willoughby on the Constitution, 2nd Ed., § 1093.

In *Coffman* v. *Breeze Corporations, Inc. and the United States*, No. 71, this term, decided January 2, 1945, ... U. S. ....., it was said that all that is necessary to entitle a plaintiff to relief by way of declaratory judgment is that there be "an actual case or controversy," that the issue be "actual and adversary," and that the judgment is not a "medium for securing an advisory opinion in a controversy which has not arisen." That case very clearly shows when a "controversy" is, or is not presented. And see *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, no effort to enforce the Act was shown nor was there any claim of any threat of enforcement. In sustaining the suit it was said, through Mr. Justice Vandeventer:

> "One does not have to await the consummation of threatened injury to obtain preventive relief."

In numerous cases the only threat was implicit in the statute itself. *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498; *Thornhill* v. *Alabama*, 310 U. S. 88.

Under the foregoing cases, had nothing more appeared than the entry of the Board's order and the general contentions of the Board openly expressed and publicly known that such orders were regarded as compulsory upon the employer, Petitioner would have been entitled to relief because of the threat which was implicit in the Board's order itself. However, in the instant case the complaint showed the actual threats made by Respondents for the enforcement of the order. If there was no "controversy" between Petitioner and Respondents when the present complaint was filed then we do not know the meaning of the word. In *Currin* v. *Wallace,* 306 U. S. 1, the court entertained a suit under the Declaratory Judgments Act and for an injunction against the enforcement of the Tobacco Inspection Act on the ground of its unconstitutionality, under which Act the Secretary of Agriculture had power to establish standards and where penalties were imposed for various violations. There was nothing in the Act which vested any particular powers of enforcement in the Secretary of Agriculture, and so far as appears there was no especial threatened enforcement of the Act other than was implicit in the Act itself. There is absolutely no ground for challenging the jurisdiction of the District Court to entertain this suit merely because, as is said, the National War Labor Board itself has no powers of enforcement.

We have heretofore adverted to material distinctions between what was involved in the *Motor Carriers* case and the *Ward* case on the one hand and the instant case on the other, and we have pointed out matters referred to in the opinions in those cases which were deemed of controlling importance, and that in the instant case facts were present which supplied what was lacking in those cases. Furthermore, the *Motor Carriers* case seems to have been a mere attempt on the part of the employers

to secure a judicial review of the merits of the Board's order. In the instant case Petitioner is insisting that by the Board's order and its threatened enforcement its constitutional rights have been invaded, and it is being required to enter into a contract which requires it to violate the National Labor Relations Act.

In both courts below it was speciously argued that both Petitioner and Respondents agreed that the Board's order was without legal effect. Petitioner's insistence was that the Board's order purported to be, and was asserted by the Board to be, binding and compulsory upon Petitioner and enforcible against it, and amounted to "compulsory arbitration" and that such order was therefore unconstitutional and void. This under the principle of the *Wolff Packing Company* case, 262 U. S. 522; 267 U. S. 552. In that sense, of course, like any unconstitutional act or statute, it would have no "legal effect." On the other hand, up to the time of suit the Board was claiming that the order was compulsory and was not merely advisory, and was valid and enforcible against Petitioner. Does the fact that after commencement of suit Respondents come before the court and say that the order was merely "advisory" defeat such suit any more than if a law enforcement officer, when suit is brought against him to restrain the enforcement of a statute claimed to be unconstitutional, comes before the court and admits that the statute is unconstitutional? Does that admission defeat the suit and leave the plaintiff wholly without remedy against the threat of enforcement or does it in effect concede the right to relief? In legal effect, does it make any difference whether there is a threat to enforce a statute claimed to be constitutional or a threat to enforce a statute which is admitted to be unconstitutional? We see no difference, and there is none. The threat of enforce-

ment of a statute, whether claimed to be constitutional or admitted to be unconstitutional, is what invades the plaintiff's rights. To admit, as was done in the instant case after commencement of suit, that the Board's order was advisory only was to admit Petitioner's claim or right to relief, and we earnestly urge upon this court that Petitioner had the right to the entry of a judgment by the District Court declaring its right and relations with respect to such order, whether it be compulsory and invalid on account thereof or whether it be advisory only, and that Petitioner should not be dismissed out of court with a dismissal of the complaint with no protection whatsoever against the threatened unlawful actions of the Respondents.

Petitioner does not seek merely an advisory opinion of the court. It was faced with a very tangible and concrete situation. An actual order had been entered against it by the Board and its enforcement threatened to the point of the extinction of Petitioner's business. It sought protection against that order and against that enforcement, or at least it sought the declared judgment of the court as to its rights with respect to the order. If that is what is meant by an "advisory opinion" of the court then we cannot think of a single case which could be maintained under the Declaratory Judgments Act.

To say, as Respondents say, that the Board's orders under Executive Order 9017 "do not fix or alter the legal rights" of the parties is wholly inconsistent with the Board's position prior to the commencement of the suit with respect to its orders. Respondents should not now be permitted to take their present position where it is intended solely to defeat the suit and bring about a dismissal of Petitioner's complaint. Even though none of the Respondents have the legal right to themselves enforce

the Board's order, Petitioner's constitutional and other rights were impinged when the Board asserted that its order was compulsory and threatened to enforce the same, and moreover, when the Director of Economic Stabilization was directed to impose sanctions pursuant to Executive Order 9370, where there was no stated and clear distinction between orders entered prior to and subsequent to the enactment of the War Labor Disputes Act.

Technically an opinion is no part of the court's judgment.[6] When, therefore, the Board and the law officers of the Government, in the face of the characterization of the Board's orders by the court below as "advisory," still insist and announce their purpose to employ any and all administrative or executive action for the enforcement of such orders, it is plainly evident that they feel no restraint upon them by the views of the court below, but propose to be bound only by the judgment itself, which is to be one for the dismissal of the complaint. At times this court has held its hand in actually awarding relief by way of formal judgment where coordinate branches of the Government are concerned, or where lower court or state court judges are concerned—on the supposition, however, that such parties would conform to the views which this court had expressed. But this court has never,

6. In 33 C. J. at p. 1104, it is said: "* * * The reasons assigned by the court for the judgment entered do not constitute a part of the judgment. Therefore a judgment or decree of the court controls the written opinion, and if they are at variance, the former prevails and determines the rights of the parties." In respect of this last statement there are cited *Harriman* v. *Northern Security Co.*, 197 U. S. 244; *Abraham* v. *Casey*, 179 U. S. 210.

In 21 C. J. S., at p. 414, it is said that an opinion "cannot prevail against the final order or decision." See also *Stone* v. *United States*, 164 U. S. 380 at p. 383; *United States* v. *Shoshone Tribe*, 304 U. S. 111; *United States* v. *Wells*, 283 U. S. 102.

Unquestionably a court may look to an opinion of another court for certain purposes. But in the final analysis the judgment is controlling. Cf. *M. E. Blatt* v. *United States*, 305 U. S. 267. It must follow then as a matter of necessity that in case of conflict the judgment and not the opinion controls. We again point out, therefore, that the characterization by the court below of the Board's order as being advisory gives no protection to Petitioner against the judgment dismissing its complaint.

so far as we know, expressed views in favor of a litigant and then dismissed his suit. We could understand that out of a delicate regard for the Respondents the court below might have suggested that in view of its views as to the nature and extent of Board orders it felt assured that the Board and other parties concerned would conform thereto without the necessity of the entry of a formal order. We see no sense or justice, however, in doing what the court below has done in this case, namely, to direct a dismissal of Petitioner's complaint, although it apparently sustains Petitioner's position to the effect that the Board's order is not binding or compulsory upon it—even though the court's reasons for such holding are not the same as the reasons urged by the Petitioner.

B. The Suit Here Is Not in Effect One Against the United States.

We do not intend to indulge in any extended argument of this point. Apparently the court below does not regard the instant suit as being one against the United States—even though it directs, apparently without limitation, the granting of Respondents' motions to dismiss. Had the court below regarded the present suit as being against the United States in effect it would not have had jurisdiction to any extent beyond such holding, it would have no right or jurisdiction to determine anything as to the character of the orders of the War Labor Board.

II.

Petitioner Established a Claim Against Respondent Upon Which Relief May Be Granted.

A. Petitioner Stated a Claim Upon Which Injunctive Relief May Be Granted.

Respondents seem to contend that the complaint does not show that Petitioner has been, or will be, irreparably damaged by any action or threat of action by Respondents, and that Petitioner therefore is not entitled to relief in equity. Here again the contention is based upon the proposition that the order of the Board was merely advisory. We again point out that the Board's order was intended to and did, according to the Board's interpretation thereof at the time of the show cause hearing, fix the status of Petitioner's labor relations against its will; that the order remains a constant threat against Petitioner. That the Board made the threats and proceeded to act under them as alleged in the complaint is admitted by the motion to dismiss.[7]

The very assertion of the Board that it had the power of compulsory arbitration, and that its order amounted to a compulsory arbitration award, and that Petitioner would be compelled to comply therewith, is in itself a violation of Petitioner's constitutional rights. In the second *Wolff Packing Co.* v. *Court of Industrial Relations*, case, 267 U. S.

7. Not only would the Board compel Petitioner to accept a contract against its will in violation of Petitioner's constitutional rights (see note 5 *supra*), but it would impose upon Petitioner a standard clause for maintenance of membership which has no sanction of Congress. The Board avowedly grants such a provision to all unions. *Little Steel*, 1 W. L. R. 325; *Atlas Powder*, 5 W. L. R. 371; *Humble Oil & Rfg. Co.*, 15 W. L. R. 380. In so doing it, in effect, adopts or establishes a national policy. Only Congress may legislate.

In view of the decisions of this court in the *Wallace* and *Richwood* cases, No. 66-67, this term, ... U. S. ....., decided December 18, 1944, there would seem but little question that provisions for maintenance of membership and check-off are in violation of the National Labor Relations Act, entirely aside from the fact that they are forced upon the employer against his will.

552, this court assumed that compulsory arbitration contemplated compliance by any means.

Under the doctrine of the numerous cases heretofore cited, therefore, and particularly *Stark* v. *Wickard*, 321 U. S. 288, the Board may be enjoined from doing anything further to compel Petitioner to comply with its said order. It is not technically correct to say, as Respondents say, that the said order is not "self-enforcing." The order purported to be self-enforcing in that it purported to fix the rights of the parties. That the Board itself was not the "policeman on the beat" for purposes of enforcement is immaterial. It advises Petitioner that it proposes to do everything possible to bring about compliance.[8] Petitioner is not required to speculate how, or in what form, the Board's activities will appear, nor assume the hazard therof. The fact that the Board had a "compliance officer" certainly was not a meaningless gesture.

Nor is it sound law to say that an administrative body will not be enjoined from giving advice—not as applied to the circumstances here present. The Board was not giving advice to the President as to what they thought the President should do. Rather the Board was telling Petitioner what the Petitioner was required to do and would be made to do, and Petitioner was told that the Board would exhaust all means to bring about compliance. It is idle, therefore, to argue that merely because the Board might not itself seize a plant or impose a sanction that it is to remain free from the consequences of its own unlawful conduct.

So far as the Director of Economic Stabilization or the Board itself is concerned, it might be pointed out that while Executive Order 9370 is directed to the Director himself, the Board was authorized to consider and advise with the Director, and it is not a too violent assumption that in any

8. Compare what it attempted to do in the *Windsor* case. (J. A. 69-70.)

action under Executive Order 9370 the Director will advise with and act in concert with the Board. It is therefore wholly proper that when the Director himself is made a party to the suit the Board may also be made a party.

Furthermore, there would seem to be no question that under the authorities an action will lie against the Director if he is directed to or is about to proceed against the Petitioner pursuant to Executive Order 9370. Nothing in the record before the court makes it clear that the Director will not act at any time that suits his own convenience. The insufficiency of the Director's letter which was made a part of the Garrison affidavit, and the Garrison affidavit itself, has been mentioned above. We will have occasion to mention it again in a subsequent portion of this brief. Suffice it here to say that the Director has not effectively disclaimed any power to invoke the sanctions specified in Executive Order 9370 in a case like the instant case, nor, we may say, has the Director any power himself to limit the President's order. Whether he has or has not the power to proceed with respect to the Board's order of May 31, 1943 may be a legal question for the court ultimately to determine, in which event such determination should be incorporated into a declaratory judgment. Short of that no one but the President himself may limit or effectively construe his order.

B. Petitioner Has a Claim Upon Which Declaratory Relief May Be Granted.

The Declaratory Judgments Act explicitly provides that relief may be had by way of declaring the rights and legal relations of the plaintiff wholly irrespective of whether any other or further relief may or may not be had. In view of the controversy as to the effect of the Board's order and the necessity of Petitioner's complying therewith and

the possible consequences thereof, Petitioner had the right to ask the District Court to declare its rights and legal relations with respect to the order. If in fact or in law the controversy had not reached a point where a remedy by way of injunction was appropriate, the court nevertheless could still proceed to declare the rights of the parties. The decisions of this court, including specifically *Currin* v. *Wallace*, 306 U. S. 1, sustain that right. See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227.

We see no reason, if the order was advisory in the fullest literal sense indicated by the court below, why it was not appropriate, or why Petitioner did not have the right to have the court so declare by a *judgment* entered in the case. And we have shown that the opinion of the court below as to the effect of the order is no part of, and would not control as against a judgment dismissing the complaint. Certainly Petitioner is entitled to some protection against the enforcement of an order otherwise unenforcible—no matter what the ground may be for its being unenforcible, when its enforcement against Petitioner is being specifically threatened. To deny relief by way of declaratory judgment, as the court below in this case has done, is to destroy the purpose and efficacy of the Declaratory Judgments Act. We have already made mention of the fact that frequently a declaratory judgment has the same admonitory effect as an injunctional order. *Great Lakes Co.* v. *Huffman*, 319 U. S. 293. Petitioner respectfully insists that it is entitled to some protection from the court against the order in question.

It has already been said that Respondents urge that the validity of Executive Order 9017 as amounting to compulsory arbitration, and the constitutional power of the Board acting pursuant thereto, may not be inquired into because the President himself is not a party to this suit.

It is sufficient to say that wherever an administrative official seeks to justify under a Presidential or executive warrant or license, the validity of such warrant or license may be questioned in any appropriate action. The fact that the President himself is not a party to the proceeding is immaterial. *United States* v. *Lee,* 106 U. S. 196; *Ex parte Quirin,* 317 U. S. 1; *Hirabayashi* v. *U. S.,* 320 U. S. 81.

The complaint shows that the Board—in fact all Respondents—were acting pursuant to executive orders of the President, and that the Board's assertion of the compulsory effect of its order stemmed from the compulsory effect of Executive Order 9017. Necessarily, under such circumstances, if the Board seeks to justify the exercise of its claimed powers, the constitutional validity of the executive order itself is a proper subject of inquiry.

III.

Respondents Were Not Entitled to a Summary Judgment.

A motion for summary judgment may be granted only when it appears that there is no genuine issue of fact, and that the moving party is entitled to a judgment as a matter of law. (Rule 56.) No answer was ever filed by Respondents. Therefore there was no issue joined as to any of the allegations of the complaint. On the contrary the motion to dismiss admitted such allegations.

It is claimed that the Garrison affidavit shows that Executive Order 9370 does not apply to the Board's order here involved. To begin with, as appears from what we have said with respect to that affidavit in the accompanying petition for certiorari, the affidavit presents no evidentiary fact whatsoever, but is "conclusory" in form. The Vinson letter itself, at best, states a possible construc-

tion of Executive Order 9370, and the Garrison affidavit merely states as a conclusion that the Director of Economic Stabilization does not intend to act in the case of an order of the Board entered prior to the enactment of the War Labor Disputes Act. The opposing affidavits, however, showed that the Board itself was claiming that its powers were the same so far as the compulsory character of its orders were concerned before the enactment of the War Labor Disputes Act as they were subsequent to such act; that the Board's orders, even under Executive Order 9017, amounted to compulsory arbitration and employers were to be compelled to comply therewith.

There was not even a denial in any affidavit of the plain explicit allegation in the complaint that the Board had reported the matter to the President (J. A. 32) or that the Director of Economic Stabilization had or was about to impose sanctions (J. A. 32-33), or that the Director of Economic Stabilization and other governmental agencies were about to or had taken action to withhold or withdraw priorities, etc., from Petitioner. (J. A. 33.) Rule 56(e) requires affidavits offered in support of motions for summary judgment to set forth such facts "as would be admissible in evidence." Nothing in the Vinson letter or in the Garrison affidavit would be "admissible in evidence." In *Walling* v. *Fairmount Creamery Co.*, C. C. A. 8, 139 Fed. (2d) 318, the Eighth Circuit held that conclusory affidavits were insufficient. We do not see how Rule 56 would permit any other view.

It would seem, therefore, that the motion for summary judgment adds nothing to Respondents' motions to dismiss. And there again it is respectfully urged that the order of the District Court overruling said motion should have been affirmed by the court below—wholly irrespective of what that court thought of the character of the Board's order.

All Petitioner was seeking in the instant suit was a determination of the question whether the Board's order was binding upon it and whether Petitioner would be required to comply therewith. It sought a determination as to whether a system of compulsory arbitration pursuant to executive order was within the domain of the Constitution. Petitioner further sought a determination as to whether it could be required to include provisions in its labor contract—for maintenance of membership and check-off—which would compel it to violate the National Labor Relations Act. Notwithstanding the "lip service" which the Board and other administrative officials have given to the proposition that employers were entitled to have such questions passed upon by the courts, such officials, by urging the dismissal of the present litigation, seek to prevent any such determination.

We respectfully urge either that this court grant certiorari and determine the vastly important substantive questions involved and thereby save further delay, or else reverse the court below and send the case back to the District Court for a hearing upon the merits. Cf. *Utah Fuel Co. v. Bituminous Coal Commission*, 306 U. S. 56.

Respectfully submitted,

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